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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. AMY HEATHER DAVIS, Defendant and Appellant.	D052605 (Super. Ct. No. SCD194323)

APPEAL from a judgment of the Superior Court of San Diego County, Melinda J. Lasater, Judge. Affirmed.

I.

INTRODUCTION

Defendant Amy Heather Davis appeals from the trial court's judgment and sentence. After a lengthy trial, a jury convicted Davis of felony murder and found true the allegations that the murder was committed during the commission of a robbery and a burglary. The trial court sentenced Davis to life in prison without the possibility of parole.

On appeal, Davis asserts that (1) the prosecutor vindictively prosecuted her by amending the information to allege special circumstances based on Davis's election to proceed to trial; (2) the prosecutor committed misconduct in commenting, during closing argument, on Davis's failure to call her mother as a witness to testify on her behalf; (3) the trial court erred in admitting Davis's statements to police because, as a result of Davis's use of methamphetamine, her statements were involuntary and unreliable; (4) the evidence was insufficient to support the jury's special circumstance findings; and (5) the sentence of life without the possibility of parole constitutes cruel and unusual punishment under the circumstances of this case.

We conclude that Davis has failed to establish that the prosecutor's decision to amend the information to allege special circumstances constituted vindictive prosecution. We similarly reject Davis's contention that the prosecutor's comment regarding Davis's failure to call her mother as a witness constituted prosecutorial misconduct. We also conclude that the trial court did not err in admitting Davis's statements to police.

We further reject Davis's claim that there was insufficient evidence to support the jury's finding as to the special circumstance allegations. Finally, we conclude that Davis's sentence does not violate the California or United States Constitutions' prohibitions against cruel and/or unusual punishment.[1] We therefore affirm the judgment and sentence of the trial court.

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1 The Eighth Amendment to the United States Constitution prohibits imposition of "cruel *and* unusual punishment." (Italics added.) Section 17 of article I of the California Constitution prohibits imposition of "[c]ruel *or* unusual punishment." (Italics added.)

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

The victim, 57-year-old Theodore Salanti, and the defendant, 24-year-old Davis, were friends. Although the two apparently did not have a sexual relationship, Salanti's friends believed that he wished that Davis was his girlfriend. Salanti often gave Davis generous sums of money, provided her with drugs, and allowed her to use his car. Davis was a frequent guest at Salanti's condominium.

Salanti was a drug dealer and user. He was known to keep large quantities of drugs, including methamphetamine and marijuana, in a safe located in his bedroom/workroom, and in other places around his condominium. He also was known to keep large sums of cash—often between $20,000 and $100,000—in his home. He kept drugs and cash in a home safe, and would sometimes hide cash under his carpet. Salanti often bragged about his money.

Davis stole approximately $30,000 from Salanti at one point approximately a year before Salanti was killed. According to Davis, she offered to give the money back to Salanti, but he allowed her to keep it, told her not to steal from him again, and said that if she ever needed anything, she could just ask him for it.

One of Salanti's closest friends last saw Salanti alive on Friday, September 23, 2005. In the very early morning hours of September 23, Salanti sent an e-mail to Davis

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For the sake of simplicity, when we discuss the United States and California Constitutions' prohibitions together, we will refer to the prohibited acts as "cruel or unusual punishment."

in which Salanti said, "Hey, I'm just forgetting about you. You [*sic*] back with your ex, so don't call or come over." Davis went to Salanti's home on Saturday, September 24.

At 3:12 p.m. on September 24, Davis went to a 7-Eleven store near Salanti's condominium and bought a Slurpee, a Gatorade, M&M's, Blistex, and cigarettes. She paid with a $100 bill.

At 4:00 a.m. on September 25, Davis went to a Sav-On drugstore and purchased a "Wonder Wheeler."[2] Davis also returned to the 7-Eleven nine different times that day, and bought, among other things, various cleaning products.

At about 5:30 p.m. on September 26, a locksmith called to follow up with Salanti regarding work that the locksmith had begun on Salanti's car on either September 23 or 24.[3] The locksmith had made a number of unsuccessful attempts to reach Salanti by telephone during the intervening days. However, on the evening of September 26, a woman answered Salanti's telephone and told the locksmith that Salanti had gone out to get something to eat.

Salanti's neighbors saw Davis in the condominium complex and driving Salanti's car between September 23 and September 28. One neighbor saw Davis wearing a bathing suit. Davis appeared to be walking to or from the complex pool. On September 28, Davis was pulled over by California Highway Patrol officers while she was driving Salanti's car.

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2 It appears from the record that a "Wonder Wheeler" is a cart.

3 Salanti was having his car locks changed because his car had been stolen a few weeks before he died.

On Thursday, September 29, Salanti's friends called 911 after they had been unable to reach Salanti for a number of days and had observed things that they thought were suspicious inside his condominium.[4] Fire officials responded to the call and pried open the front door. Once the door was open, they smelled the odor of a decomposing body. The fire officials discovered Salanti's body inside a suitcase in the entryway. The suitcase was wrapped in duct tape and covered with a comforter and a sleeping bag.

Salanti's face, including his nose and mouth, was covered in duct tape. His hands were tied behind his back with rope. There was duct tape around Salanti's right ankle. Two of his pants pockets were pulled inside out. His empty wallet was found in the master bedroom.

The medical examiner determined that Salanti had been dead for several days before his body was discovered. The cause of death was determined to be "homicidal violence including asphyxiation." Salanti's body was bruised, and he had six fractured ribs. Salanti's body tested positive for amphetamines, fentanyl and marijuana.

Police found Davis's DNA on several items inside Salanti's condominium, including cigarette butts, a plastic cup, a latex glove found in the trashcan, a knife handle, and a box cutter. A piece of latex glove with Davis's DNA on it was found attached to

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4 When Salanti's friends went to his home, they found the window blinds up and crooked, and they could see that things inside the condominium were in disarray. In addition, the television was on, and there was a cart in the middle of the living room. Salanti's friends thought that this was unusual because Salanti typically kept his condominium very neat.

duct tape that matched the duct tape on Salanti's body. Davis's fingerprints were found all over the condominium.

At approximately 1:30 p.m. on Saturday, September 24, someone performed an internet search on Salanti's computer seeking information concerning Liberty floor safes. Additional searches were performed between 4:00 p.m. and 10:00 p.m. that day regarding how to locate and open safes. On Tuesday, September 27, between 1:00 p.m. and 2:00 p.m., two searches were conducted on Salanti's computer. One involved how to get rid of the odor from a decaying body, and the other involved how to find a floor safe and open it.

In Salanti's car, investigators found papers that contained Salanti's banking information, blank checks, and documents regarding safes.

On October 1, 2005, San Diego police officers went to Davis's mother's home where they met with Davis. Davis agreed to accompany the officers to the police station for an interview. On the way to the station, Davis told the officers that she had been driving Salanti's car, and took them to the car. During the interview, Davis said that she had last seen Salanti alive on Thursday, September 22. She claimed that on that day, she borrowed Salanti's car because her car had broken down. Davis denied any knowledge of Salanti's death. She admitted to detectives that in the past she had stolen $30,000 from Salanti. According to Davis, Salanti had forgiven her.

Davis told the detectives that Salanti usually kept more than $100,000 in his condominium, and that he kept money in the safe in his home, and also hid money in other places throughout the home. Davis said that she knew the combination to Salanti's

safe because he had given it to her. Detectives noticed that Davis had scratches on both of her hands.

On October 2, the day after Davis first spoke to detectives, Davis called detectives and left a voicemail message in which she indicated that she had more information for them. Detectives met with Davis on October 4. She told the detectives that she had failed to tell them something on the previous occasion when she spoke with them because she was scared. She said that she had called the detectives to ask to speak with them again after she told her brother and mother "everything." Davis told the detectives that she knew that two men had been involved in Salanti's death.

According to Davis, two men who were armed with a knife approached her outside of Salanti's condominium while Salanti was gone. The men entered Salanti's condominium and stole his marijuana from a kitchen cupboard. The men then forced Davis to sit in the room where Salanti's desk was located. She heard Salanti come in, and she could hear the two men beating him. She tried not to listen, and claimed that she did not know what else had happened. Davis told the detectives that she ran outside, and that the two men told her to drive them to the intersection of El Cajon Boulevard and Utah Street. She asked the men whether they had hurt Salanti, and they assured her that they had not. One of the men said that he wanted Salanti's computer, so they were going to come back to Salanti's condominium. The men told Davis not to tell anyone about what had occurred.

Davis returned to Salanti's condominium alone, and sat outside. She assumed that this is when Salanti's neighbors saw her. However, Davis did not know on which day

this occurred. She explained she "was using" at the time. According to Davis, the men returned to Salanti's condominium two more times. They repeatedly threatened her and forced her to search the condominium for hidden money and drugs. After they left the last time, Davis entered the condominium. She did not see Salanti and did not know where he was. However, later during the interview, Davis said that she found Salanti's lifeless body in a closet while the two men were in another room. She said that she did not know how Salanti's body ended up in the suitcase.

Davis alternatively claimed that the cart she purchased was for laundry, trash, or for "everything else" the men were going to steal from Salanti's place. Davis said that she was scared to call the police because the men were in a gang and could find her if she said anything to the police. Davis eventually admitted that she had taken drugs from Salanti's safe. She said that there had been a plan, and that she was going to "get a cut of money" and drugs for helping the men.

Davis said that after this all happened, she went to a friend's house. Davis told her friend what had happened and said that she was scared of the men.

On October 12, 2005, police arrested Davis. Davis waived her *Miranda*[5] rights and agreed to speak with detectives again. Davis reiterated that she did not know the two men, and said that they had approached her while she was outside Salanti's condominium, smoking. The men told her that they knew who she was, and said that they "knew [Salanti]'s whole situation." The men told Davis that they wanted to go inside Salanti's

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5 *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

home, and said, "[W]e're here for a purpose and you already know what the purpose is and just work with us and I'll even give you a little bit of money."

According to Davis, the men went inside and found Salanti's marijuana. They told Davis to close the blinds. The men asked Davis to open the safe, which she did, but there was no cash in it. After a while, Davis thought that the men had left, and she played dominos on the computer. She went outside, and the two men returned. They forced her to go inside and then began to search for something in the kitchen. Davis went back into the office and started playing dominos again. Davis said that she did not know when Salanti came home, and that she did not hear him say anything to the men when he returned. She eventually heard a "ruckus" and then heard "kind of like a moan." Davis was surprised that Salanti had come into the home without her having seen him, since she had been watching out the office window for him to return.

After she heard the noises, Davis "knew immediately that they beat [Salanti] up." She "just froze inside." One of the men came into the room where Davis was and told her that "everything [was] gonna be their way now." Davis started to cry and asked the men where Salanti was. The men told Davis that they had beat up Salanti, but said that he was fine. They ordered her to search the house. Davis thought that the men were holding Salanti hostage and that if she helped them, they would leave. Davis proceeded to search the condominium for money. She eventually told the men that she could not find anything, but they told her to "try harder." Davis said that the men sent her to Sav-On to buy a cart so that the men could load it up with the things they wanted to take from Salanti's condominium.

Davis told police that she did not know that the men had killed Salanti at the time she was searching for the money. She eventually found Salanti's body in the closet while she was searching the bedroom. Davis thought one of the men might have seen her looking in the closet where she found Salanti's body, but she tried to pretend that she did not know that Salanti was dead. The men ordered her to take clothes out of a suitcase, but she did not think that they were going to put Salanti's body in it. Davis said that she did not see the men put Salanti's body in the suitcase, but admitted that she helped them put duct tape around the suitcase.

The men had Davis drive them to El Cajon Boulevard and drop them off. After she dropped them off, Davis returned to Salanti's condominium. She estimated that the entire ordeal lasted approximately two days. Davis remained at Salanti's condominium until at least Tuesday, September 27.

Davis testified at trial. She continued to maintain that the two men who approached her outside Salanti's condominium had a knife, and that they had threatened her. She said that she did not know that Salanti had been killed until after she dropped off the men near El Cajon Boulevard.[6] Davis testified that she had not found Salanti's body in a closet, but rather, that she found the body, already in the suitcase, after she returned from dropping off the two men.

At trial, Davis admitted that she had lied to the detectives when she told them that the men had directed her to look for money and drugs. She said that she had not opened

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6 Davis also testified at trial that when she dropped off the men, they took her Social Security card, her cellular telephone, and a backpack full of her belongings.

the safe while the two men were still at the house, but after they had left. Davis acknowledged that she, alone, had caused all of the damage that had been done to Salanti's condominium. She explained that after she found Salanti dead, she did not know where to go. She was high on methamphetamine and thought that Salanti might have hidden money in a secret safe. Davis thought that if she found the money, she "could just run, basically, because [she] was freaked out." Davis also admitted that she was the one who had dragged the suitcase with Salanti's body inside to the front entryway of the condominium. When asked why she had done that, Davis replied, "I was trying to cover everything up. I thought that I could make everything just kind of go away. That's why there was a blanket on it. I didn't know what I was doing, to be honest. I just – I was freaked out. I didn't know what to do. I didn't – there was no way I was going to call the authorities, and I had nobody. I didn't know what to do, so I made a lot of stupid mistakes."

Davis disclaimed having helped the two men put duct tape on Salanti's body, and retracted her earlier admission to detectives that she had handed strips of the duct tape to the men. She admitted that she had used duct tape on a wall in the dining room and that she had put duct tape over the blanket that was found on top of the suitcase.

Davis testified that she did not intend to steal from Salanti when the men approached her on Saturday, September 24, or when she let the men into the condominium. She said that she also did not intend to steal from Salanti when she heard the men beating him up. Davis stated that she never had an agreement with the men for a "cut" of whatever was found in exchange for her participation in a scheme to steal from

Salanti. She said that the reason she did not call the police after the incident was because Salanti had been robbed a number of times and had never reported any of the crimes to authorities. She said that Salanti had indicated to her that he did not want such incidents reported to the police.

Dr. Alex Stalcup, medical director of the New Leaf Treatment Center in Lafayette, California, testified as an expert on methamphetamine use. Dr. Stalcup opined that during her interviews with police, Davis was going through the "crashing phase of the methamphetamine binge cycle." Dr. Stalcup testified that Davis's conduct after Salanti's death was consistent with that of a person on a methamphetamine binge or in the "tweaking" phase, which usually occurs 18 to 24 hours "into the binge, [and is a state] in which they maintain intoxication." According to Dr. Stalcup, individuals who are tweaking are "able to think, but they're very very, high."

B. *Procedural background*

The District Attorney initially charged Davis with one count of murder, with no special circumstance allegations, in December 2005. On February 9, 2007, the People filed an amended information that charged Davis with murder and alleged two special circumstances—i.e., that Davis aided and abetted in Salanti's murder while an accomplice to the crime of robbery, and that she did so while an accomplice to the crime of burglary. Defense counsel informed the court that the prosecutor had agreed to "hold off on the arraignment until the trial date." The court did not arraign Davis on the amended information at that time.

On March 6, 2007, the trial court arraigned Davis on the amended information[7] and began the jury voir dire proceedings. That same day, the prosecutor filed a document entitled "Second (handwritten) AMENDED INFORMATION." The special circumstances alleged in this information were that Davis committed Salanti's murder while engaged in the commission or attempted commission of both a robbery and a burglary. The "aiding and abetting" language of the prior amended information had been deleted.[8] Davis was arraigned on the second amended information on March 7.

The court swore in the jury on March 9, 2007. However, on March 14, 2007, the court granted Davis's motion for a mistrial on the ground that the jury had heard references to a polygraph examination on certain audio evidence. These references were to have been redacted.

On March 15, 2007, the trial court began new voir dire proceedings. The court swore in the second jury on March 21, and the trial commenced.

The jury returned its verdict on April 11. The jury found Davis guilty of murder, and found both of the special circumstance allegations to be true.

On January 11, 2008, the trial court sentenced Davis to a term of life in prison without the possibility of parole.

Davis filed a timely notice of appeal on February 25, 2008.

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7 Davis waived formal reading of the amended information.

8 The file stamp on the document shows that the document was filed on March 6, 2007.

III.

DISCUSSION

A. *Davis has not established that the charging of the special circumstances allegations constitutes vindictive prosecution*

Davis contends that the prosecutor engaged in vindictive prosecution when he added the two special circumstance allegations to the charge of murder, after jury voir dire had begun. She contends that the facts of her case demonstrate the existence of "actual vindictiveness" on the part of the prosecutor. We disagree.

1. *Additional background*

The District Attorney initially charged Davis in December 2005 with one count of murder, with no special circumstances allegations. At a readiness conference on April 6, 2006, the prosecutor stated, "There is one additional thing I would like to put on the record, and that is we have prepared an Amended Information. Defense counsel has been successful in persuading the D.A.'s office not to file it at this time. It is our intention to do so, [a]waiting the outcome of some forensic evidence that the defense is pursuing. We won't be filing the amended [information] at this time."

At a *Marsden*[9] hearing that was held on October 5, 2006, the defense made it clear that it was aware that the prosecution intended to file the special circumstance allegations if Davis did not agree to plead guilty to first degree murder.

On November 3, 2006, at a hearing to discuss setting the date for trial, the prosecutor informed the court that it was the prosecution's "intention to file

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9 *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

specials . . . we thought there would be further negotiations, but we're going to go ahead and file the specials." After further discussion, the court said, "I'm assuming from what you're saying that you're too far apart in terms of negotiations?" Defense counsel stated that she was attempting to "get a determinate sentence for [Davis]," and indicated dismay at the prosecution's offer of first-degree murder. The prosecutor stated, "I think your client's expectations are so far apart from what ours are. There's little chance of a meeting of the minds." Defense counsel and the court engaged in further discussions as to how it might be possible to arrive at a plea agreement that would provide for a determinate sentence sufficiently long to satisfy the District Attorney.

On November 29, 2006, Davis waived her right to have her trial begin at that time. The trial was continued to January 2007. At the November 29 hearing, the prosecutor said, "There was one issue, your Honor, with respect to the charging document. [¶] As we indicated in chambers last time, we're going to amend and add the specials. I spoke to counsel earlier this week, and again, at the defense's request, we're going to hold off on that amendment until either January 3rd or December the 18th." The court asked, "Could we sort of solidify that. I'm assuming we're going to hold off because there are discussions," and the prosecutor replied, "Correct." After the trial court expressed some concern about the timing of the filing of the special circumstances, defense counsel said, "Your Honor, I had asked if it could be held until the trial date of January 3rd. That's still my request. [¶] . . . [¶] *The defense has certainly been given plenty of notice of the People's intention to file special circumstances*. So I told Mr. Espinoza if he gives us that

accommodation, we're not going to raise on [*sic*] the issues with regard to late filing." (Italics added.)

On February 9, 2007, the prosecutor filed an amended information charging Davis with murder and alleging two special circumstances—i.e., that Davis aided and abetted in Salanti's murder while an accomplice to the crime of robbery, and while an accomplice to the crime of burglary. Defense counsel informed the court that the prosecutor had agreed to "hold off on the arraignment until the trial date," suggesting that the prosecutor's decision to delay the arraignment was the result of a request by defense counsel. The court did not arraign Davis on the amended information at that time.

On March 6, 2007, the trial court arraigned Davis on the amended information. However, at some point that day, the prosecutor filed a second amended information, in which the "aiding and abetting" language in the special circumstance allegations had been deleted.

That morning, defense counsel wanted to "put on the record the settlement offers that Ms. Davis made . . . ." During that discussion, defense counsel noted that Davis had earlier indicated a willingness to plead guilty to voluntary manslaughter, residential robbery with two or more perpetrators, residential burglary, and auto theft. Davis had also offered to plead guilty to second degree murder. The prosecutor rejected these offers. Defense counsel stated, "There was an indication that the People would accept a plea to first-degree murder without the special circumstances but our feeling is that that is tantamount to a life sentence for Ms. Davis. So we're prepared to go to trial." After the

court asked the prosecutor if there was anything he wanted to put on the record, the following colloquy occurred:

> "MR. ESPINOZA: . . . [¶] Your Honor, one thing I want to put on the record and that is that at the earliest stage when this case was still in Department 31 we informed the defense that we were going to be adding special circumstances. [¶] We delayed doing that at the request of the defense and although we formally did the arraignment today, this was a long time coming and the defense was on notice that it was coming.
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> "MS. ZIMMERMAN: That's true.
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> "THE COURT: As I recall our earlier discussions it was done with the hopes that the case could resolve, and it may be that that's what has happened. I'm not going to comment on it because I shouldn't. [¶] Anything else that we need to do?"

The attorneys and the court then discussed juror issues, and jury selection commenced. Later that afternoon, after prospective jurors were excused, the court held a conference with counsel, in chambers. At that point it became clear that there had been a mistake with regard to the charging document. The following colloquy occurred:

> "THE COURT: Let's deal with your issue first.
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> "MR. ESPINOZA: You read the Information, but the language you read was different language than what is on the charging document because you read language about aiding and abetting liability and so forth.
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> "THE COURT: Did I read the wrong one?
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> "MS. ZIMMERMAN: That's what I have. I have what was read by the Court.
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> "THE COURT: Is that your amended that you've got there?
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> "MR. ESPINOZA: Yeah, I have the amended Information that was—

"THE COURT: We have two amended Informations?

"THE CLERK: I don't think so.

"MR. ESPINOZA: There's only one.

"MS. ZIMMERMAN: I have the one that you read. The aiding and abetting.

"THE COURT: We'll have to—at this point I don't think it's critical in terms of rereading [to the jury] because I would rather not over emphasize. They're going to be given the charges of what they have to decide anyway and technically there can be an amendment prior. [¶] I actually was a little surprised when I saw aiding and abetting myself and then when you made your mini you said, you know, by herself. So I was surprised, but I figured this will all come to light later on.

"MR. ESPINOZA: Okay.

"THE COURT: I will have you take a look at what we have what [*sic*], and if I was wrong, we need to know that."

The following day, the trial court had a discussion with counsel on the record, before a panel of prospective jurors reported to the courtroom. The court stated, "The issue that we left with was the Information. The Information that I had in my file that apparently had an original signature was a different amended Information than the one that the People have, but the same one as the defense. [¶] So I think we need to deal with that issue first. Mr. Espinoza has provided to my clerk a new amended Information that I had him write on it [*sic*] 'second amended Information.' Although that's not what it says on the document that – when it was first given to me." After the court made these remarks, the following colloquy occurred:

"MR. ESPINOZA: Just let me explain, your Honor. The reason why it's printed 'amended Information' was because our intent was to file that originally. I assumed that it was, and it wasn't until I noticed when the Court read the amended Information the court was reading from an amended information that was filed with the Court in error. It should have been the document before the Court, and that's why I hand wrote 'second amended Information,' and it's my request to have Ms. Davis arraigned on the second amended Information.

"The only difference is in the language of the 190.2(a)17 allegations that accompany Count 1, and that is the previous amended Information read in a way that she was an accomplice and limited her liability to aiding and abetting type of liability. This is a more general pleading that allows just the felony murder. The special circumstances for robbery and burglary which was our intent all alon[g].

[¶] . . . [¶]

"MS. ZIMMERMAN: Your Honor, we would object to the filing of the second amended Information at this point even though Ms. Davis was only arraigned on the amended Information yesterday it was filed on February 9th, and that was the copy that the defense received that had the aiding and abetting language, and that's what we were proceeding on. Since the amended Information has been read to the jury, I think it is untimely to allow the People to file a second amended Information at this point. So we would be objecting and asking the Court to proceed on the amended Information that Ms. Davis was arraigned on yesterday and was read to the jury – the prospective jury as well."

"THE COURT: Response.

"MR. ESPINOZA: The defense has been on notice since very early on in the motion in limine in this case that we were pursuing a felony murder liability. [¶] Our principal theory of liabilities [sic] is that Ms. Davis acted alone. However, if the jury were to believe, as they are free to believe, factually that she was a participant in a felony murder along with others they could still find Ms. Davis guilty o[f] the subsequent [*sic*] offense as well as the special circumstance. [¶] It was at defense's request that we not file the amended Information for so long, and I think --- and it was to their –

> they had strategic reasons for doing that. In fact, when we did file the amended Information again on that day, it was still their request not to have it filed then. It was an error on my part –"

The prosecutor then asked the court to arraign Davis on the second amended information, arguing that Davis would suffer no prejudice because she and defense counsel were aware of the prosecution's theories. The prosecutor pointed out that he had discussed both the theory that Davis had acted alone, and the alternate theory that she acted with others, in the mini opening statement that he gave to the prospective jurors.

Defense counsel responded:

> "Your Honor, I just wanted to say – and I know I have said it on the record before that we have been on notice for a long time that the People's intention to file special circumstances if the case did not resolve. That's true. [¶] However, I think it is only recently that the People have come to a theory that they now intend to present that Ms. Davis acted alone. So I don't think that the delay or the notice was as to that theory. It was just as to the existence of the special circumstances which certainly could be and were filed as an aider and abetter as to Ms. Davis. [¶] So I guess what I'm saying is that we were not on notice. I think it was a recent development that the DA's theory is that Ms. Davis acted alone. I think that to file the second amended Information is untimely because there had not been notice until we heard the statements yesterday that that was the DA's new theory."

The prosecutor asserted that he had "made it extremely clear" to defense counsel that his interpretation of the evidence was that Davis had acted alone, and that his alternative theory was that she had been one of three individuals who committed the crimes. Defense counsel then somewhat reversed course, acknowledging that she had been aware of both theories, but indicating concern that the prosecutor was now "electing to proceed on just the one theory that she was the only actor."

The court clarified that the special circumstance allegations in the second amended information were sufficiently general to cover both theories of the case, i.e., that Davis had acted alone, or that she had acted with others. The court ruled that the prosecution would be allowed to proceed on the second amended information, and arraigned Davis on that information.

The court swore in a jury on March 9, 2007, but dismissed that jury after declaring a mistrial on March 14. A new jury was sworn in on March 21.

2. *Analysis*

"[T]he due process clauses of the federal and state Constitutions (U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, §§ 7, 15) forbid the prosecution from taking certain actions against a criminal defendant, such as increasing the charges, in retaliation for the defendant's exercise of constitutional rights. [Citations.]" (*People v. Jurado* (2006) 38 Cal.4th 72, 98 (*Jurado*).) "It is not a constitutional violation, however, for a prosecutor to offer benefits, in the form of reduced charges, in exchange for a defendant's guilty pleas, or to threaten to increase the charges if the defendant does not plead guilty. [Citations.]" (*Ibid.*)

"In the pretrial setting, there is no presumption of vindictiveness when the prosecution increases the charges or . . . the potential penalty." (*Jurado, supra,* 38 Cal.4th at p. 98, citing *United States v. Goodwin* (1982) 457 U.S. 368, 381–382 and *People v. Michaels* (2002) 28 Cal.4th 486, 515 (*Michaels*).) " ' " '[A] prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future

conduct [because] the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution.' " ' [Citations.]" (*Michaels, supra*, 28 Cal.4th at pp. 514-515.) Thus, when challenging a prosecutor's decision to increase the charges in a pretrial setting, "the defendant must 'prove objectively that the prosecutor's charging decision was motivated by a desire to punish him for doing something the law plainly allowed him to do.' [Citations.]" (*Jurado, supra*, 38 Cal.4th at p. 98.)

As an initial matter, the People assert that Davis has forfeited this argument by failing to raise the issue of vindictive prosecution in the trial court. (See *People v. Edwards* (1991) 54 Cal.3d 787, 827; see also *People v. Ledesma* (2006) 39 Cal.4th 641, 730 [defendant failed to preserve issue because he did not make a motion in the trial court "based upon a theory of vindictive prosecution"].) Davis's trial attorney objected to the filing of the second amended information on the grounds that it was untimely and prejudicial, but did not assert that it was being filed out of prosecutorial vindictiveness. As a result, Davis has forfeited this issue. However, the argument fails on its merits, as well.

Although Davis insinuates otherwise, the prosecutor added the special circumstance allegations in the pretrial stage of this case.[10] The prosecutor initially alleged special circumstances on March 6, 2007, before jury voir dire began. The

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10 Davis claims that the prosecution "eventually did [add two special circumstance allegations to the charge] on March 6, 2007, *after the commencement of trial* and in response to appellant's insistence on exercising her constitutional right to a trial." (Italics added.)

amended special circumstance allegations were also filed that day. Davis was arraigned on March 7, which was after the jury selection process had begun, but before a jury had been sworn and jeopardy attached, making all of these events "pretrial." We conclude that under this scenario, there is no presumption that the prosecution acted vindictively in alleging the special circumstances. Because the prosecution filed the special circumstances allegations before trial, Davis must show "that the ' "prosecutor's charging decision was motivated by a desire to punish [the defendant] for doing something the law plainly allows [her] to do." ' [Citations.]" (*Michaels, supra*, 28 Cal.4th at p. 515.)

Davis has not and cannot show that the prosecutor's decision to add the special circumstances allegations was motivated by a desire to punish Davis for her decision to go to trial. The record demonstrates that Davis was aware, for close to a year before the trial date, that the prosecutor intended to amend the information to allege the special circumstances. Rather than waiting to amend the information to punish Davis for not agreeing to plead guilty, the prosecutor delayed filing the special circumstances allegations at the behest of defense counsel. There is no evidence that the prosecutor acted out of vindictiveness in this situation.

Davis argues that she was first informed that she would be facing special circumstance allegations 11 months after she entered her initial plea of not guilty, and that "the allegations were not actually added until after the very start of the trial itself." She claims that "[t]his case . . . presents the unusual factual scenario . . . where the District Attorney straddled the line between pretrial and the trial itself, amending the information shortly before the jury was actually sworn in." Davis appears to suggest that

the timing of the prosecutor's amendment to include the special circumstance allegations demonstrates vindictiveness. We disagree. The record establishes that Davis was aware that the prosecutor intended to allege the special circumstances long before they were filed, and that the delay in filing them was attributable, at least in part, to requests by defense counsel.

Both the trial court and defense counsel acknowledged that they were aware that the People intended to file the special circumstances allegations if plea negotiations failed. In fact, defense counsel stated, "I know I have said it on the record before that we have been on notice for a long time that [it was] the People's intention to file special circumstances if the case did not resolve. That's true." In fact, defense counsel was aware of the prosecutor's intention to allege the special circumstances at the latest by early November 2006. On that date, in response to the fact that the prosecution was not considering agreeing to a second-degree murder plea deal, defense counsel stated, "I still think it's a pretty harsh offer. She can either plead to first-degree murder, which is a life sentence, or file specials. If she's convicted it's LWOP."

Defense counsel's only claimed surprise was that she was not on notice that the prosecution intended to proceed on a theory that Davis had acted alone: "However, I think it is only recently that the People have come to a theory that they now intend to present that Ms. Davis acted alone. So I don't think that the delay or the notice was as to that theory. It was just as to the existence of the special circumstances which certainly could be and were filed as an aider and abetter as to Ms. Davis."

Counsel's claim of surprise is curious, in view of the fact that by at least November 2006, the prosecutor had outlined a number of holes in Davis's story about the two men, and defense counsel had stated, "The problem [with regard to plea negotiations] is she's the only one on the hook, so I think the DA is going full against her because there is no one else. They don't even necessarily believe that there was someone else." Defense counsel clearly understood that the prosecution might proceed under a theory that Davis had acted alone. Additionally, the court noted that defense counsel had been aware that the prosecution planned to proceed on both theories, i.e., that Davis acted alone or that Davis aided and abetted others, from a very early point in the case.

Regardless of whether the special circumstance allegations alleged that Davis aided and abetted in the murder while an accomplice to robbery or burglary, or more generally, that Davis committed the murder while committing a robbery or burglary, the effect of the special circumstance allegations was the same: Davis faced punishment of life in prison without the possibility of parole if the jury found one of the allegations to be true. The change from the original amended information to the second amended information is thus irrelevant to Davis's claim on appeal that the addition of the special circumstance allegations was vindictive.

Davis argues that "given the unique facts of this case, the offer/demand presented by the District Attorney's Office cannot be compared with the standard offer whereby a defendant is able to carefully consider her options pursuant to making an intelligent decision as [to] whether to accept the offer or not." According to Davis, because her case involved the felony murder rule—which, she asserts, "is completely incomprehensible to

a layman"—she could not have reasonably been expected to agree to plead guilty to first degree murder. Davis argues that because "it is virtually impossible for a person who has had no actual involvement in a killing to believe she could be liable for that killing," a defendant such as Davis "could not be expected to accept a demand that she plead guilty to first degree murder, for she could not reasonably believe the law would hold her responsible for an act she did not commit."

In support of this argument, Davis submits letters that two of the jurors on her case sent to the court, after the jury had returned its verdict and before Davis's sentencing hearing.[11] Davis claims that the letters demonstrate that "to the average and conscientious person in the community the felony murder rule is totally incomprehensible." She maintains that her "point . . . is not to challenge the felony murder rule . . . ," and argues, "[T]o punish so draconianly a young woman for declining to plead guilty to a first degree felony murder charge, and for exercising her constitutional right to a trial . . . is vindictive pure and simple, especially given how and when the special circumstance allegations were added in this case."

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11 Davis contends that this court may consider these letters, notwithstanding Evidence Code section 1150, because she is not attempting to impeach the verdict. Evidence Code section 1150 provides: "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined."

Davis's argument is without merit. First, as stated above, defense counsel knew for months that the prosecutor intended to add special circumstance allegations, and the allegations were added before trial commenced. Second, the felony murder rule exists in California, and, as Davis admits, "is established in concrete." When the evidence supports a felony murder charge, as it did here, the prosecution's pretrial decision to prosecute an individual on such a charge does not constitute evidence of vindictiveness. Further, Davis had the benefit of counsel to advise her that whatever her subjective beliefs about the appropriate punishment for taking part in high risk felony crimes might be, a defendant very clearly may be held legally responsible not only for the crimes he or she intended to commit, but for a death that occurs during the commission of those crimes.

The prosecutor's adding the special circumstance allegations was occasioned by the parties' failure to reach a plea agreement. This is permissible. The record does not show that the amendment was a vindictive response to Davis's decision to go to trial. The prosecutor's addition of the special circumstance allegations was not done to "punish" Davis for declining to plead guilty to first degree murder, as Davis now contends. Rather, the prosecution held off on adding the allegations as a benefit to Davis, while she and her attorney attempted to negotiate a plea agreement with the prosecutor. There is nothing suspicious in the timing of the amendments in this situation. The fact that the prosecutor decided to charge Davis in a manner that corresponded with the evidence cannot be considered to have been vindictive.

C. *The prosecutor did not commit misconduct by noting in his closing argument Davis's failure to call her mother to testify*

Davis contends that the prosecutor's comment to the jury regarding the fact that Davis had not called her mother to testify on her behalf constitutes prosecutorial misconduct. This contention is without merit.

1. *Additional background*

During the rebuttal portion of his closing argument, the prosecutor said:

> "And she [Davis] said something else. This is a difficult argument for me to make, but I have to make it because I represent my client. She said from that witness stand that her mom turned her back on her and then at some point comforted her, and the basic sense that Amy Davis would have you believe was that even [her] mom was a witness to this duress, this fear. It corroborated it in some way, shape, or form. It's a very short distance from the audience seat to the witness seat. Ladies and gentlemen, I suggest to you Judy Davis is a good human being, probably supports her daughter. We can assume that. Very few people would get up there and testify falsely. I will leave it at that."

The prosecutor also pointed out that Davis had not called Marvin Pope, her boyfriend at the time of the incident, to testify, and that she had not presented other logical evidence that would have supported her defense.

Defense counsel did not specifically object to the prosecutor's comments regarding Davis's failure to call her mother to testify. However, defense counsel did object that the prosecutor was improperly shifting the burden when the prosecutor suggested that the defense could have had a sketch made of the men who Davis claimed had killed Salanti. Once the prosecutor finished his rebuttal argument, the trial court initiated a conference with the attorneys in chambers. Defense counsel requested that the court admonish the

jury to disregard the prosecutor's statements about the defense's failure to present witnesses and evidence. The court did not agree to do so, but suggested giving an instruction to the effect that the jury should be careful, when considering the defense's failure to call witnesses, not to shift the burden of proof to the defense. After further discussion with counsel, the court ultimately admonished the jury as follows:

> "As a reminder, ladies and gentlemen, neither side is required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of these events. Neither side is required to produce all objects or documents mentioned or suggested by the evidence. Neither side is required to perform any analysis on the evidence or present expert testimony.
>
> "Although both sides may comment on the failure of the opposing side to call logical witnesses, this does not shift any burden to the defense. The defense has no burden of proof, and the jury needs to exercise caution not to shift the burden to the defense. The People must still prove each element of the crime charged or lesser-included offense beyond a reasonable doubt."

2. *Analysis*

A prosecutor may comment on a defendant's failure to call logical witnesses. (*People v. Chatman* (2006) 38 Cal.4th 344, 407; see also *People v. Wash* (1993) 6 Cal.4th 215, 263.) "When the defendant has taken the stand . . . and offered a[] . . . defense in which he identifies other persons who could support his testimony, and those witnesses are available and subject to subpoena, there should be no question but that comment [on the failure to call those witnesses] is appropriate and permissible." (*People v. Ford* (1988) 45 Cal.3d 431, 447.) However, it is improper for a prosecutor to comment on a defendant's failure to call a logical witness whose unavailability to testify has been

established. (See *id.*, at pp. 443-448 [witness himself must assert the right against self-incrimination in order to be considered " 'unavailable;' " counsel may stipulate to unavailability, or defendant "may satisfy the court that the witness cannot be called"].)

Davis contends that her mother was not a logical witness, and also maintains that her mother was unavailable to testify because her testimony would have constituted inadmissible hearsay. We disagree with Davis on both points.

Davis's mother was a logical and material witness. Davis testified that she had gone to her mother after Salanti was killed and that her mother had comforted her. Davis's defense was that she had acted under duress. Davis's mother could have corroborated that defense if she had testified that she had, in fact, comforted Davis after Salanti was killed. In addition, at one point during Dr. Stalcup's testimony on direct examination, defense counsel asked for a sidebar conference because the court was limiting Dr. Stalcup's testimony regarding statements Davis's mother had made to him about Davis's abortion, which had occurred a few weeks before the murder. The court noted that it would have been better for Davis's mother to have testified before Dr. Stalcup was called to testify, but acknowledged that there had been scheduling conflicts. The court ruled that Dr. Stalcup could not testify as to statements Davis's mother had made to him, because those statements were hearsay. Davis's mother was therefore a logical witness for the defense in that she could have provided testimony that the defense unsuccessfully attempted to obtain through Dr. Stalcup.

Davis also contends that her mother was "unavailable" to testify because the "only basis appellant's mother would have had to comment upon her daughter's state of mind

would have necessarily come from what appellant herself had told her mother, and this, appellant submits, would have been inadmissible hearsay" because it would have been exculpatory. This contention is simply incorrect. First, Davis's mother could have testified as to Davis's behavior after the murder, not only as to any statements Davis may have made. Further, any statements Davis may have made to her mother may have been admissible as prior consistent statements to rehabilitate Davis, whose testimony was impeached by the prosecutor.

Based on her conclusion that her mother's testimony concerning anything Davis may have said to her would have been inadmissible because it "was of an exculpatory nature," Davis presumes, incorrectly, that her mother was therefore "legally unavailable" to testify because "any testimony appellant's mother might have been able to give in support of appellant's claims would have been unavailable to the defense." Davis did not establish that her mother was, in fact, unavailable to testify. We therefore reject her contention that the prosecutor committed misconduct by commenting on the fact that Davis did not call her mother as a witness.

Davis further argues that the prosecutor's comments "present[ed] the witness's testimony," which, she claims, effectively denied her the constitutional right to confront and cross-examine witnesses. According to Davis, the "implication" of the prosecutor's comment was that if Davis's mother had testified, she would have contradicted Davis's claim that she had acted under duress. However, the prosecutor did not tell the jury what Davis's mother's testimony would have been. Rather, in commenting on the defendant's failure to call Davis's mother as a witness, the prosecutor asked the jury to infer why the

defense did not call her since she was a logical witness. The purpose of a prosecutor's decision to comment on the defendant's failure to call logical witnesses is to suggest to the jury that it should infer that the testimony was not presented because it would not have been favorable to the defendant. Asking the jury to draw such an inference is proper. The prosecutor's comments about the defendant's failure to call a logical witness did not implicate Davis's right to confront and cross-examine adverse witnesses.

C. *The court did not err in admitting evidence of the statements Davis made to police*

Davis claims that "her admissions (as well as her *Miranda* waiver) were . . . involuntarily given." The federal and state Constitutions bar the use of involuntary confessions against a criminal defendant. (*Jackson v. Denno* (1964) 378 U.S. 368, 385–386; *People v. Benson* (1990) 52 Cal.3d 754, 778.) A confession is involuntary if it is "not ' "the product of a rational intellect and a free will." ' " (*Mincey v. Arizona* (1978) 437 U.S. 385, 398.)

"The test for determining whether a confession is voluntary is whether the questioned suspect's 'will was overborne at the time he confessed.' [Citation]" (*People v. Cruz* (2008) 44 Cal.4th 636, 669.) "A finding of coercive police activity is a prerequisite to a finding that a confession was involuntary under the federal and state Constitutions. [Citation.]" (*Ibid.*) Whether a statement is voluntary depends upon the totality of the circumstances surrounding the interrogation. (*People v. Neal* (2003) 31 Cal.4th 63, 79.)

Although Davis frames her argument as one challenging the "voluntariness" of her statements to police, Davis's argument is slightly different from a typical constitutional

claim that a defendant's statements to police were not made voluntarily. Davis does not allege that any police coercion occurred. Rather, she asserts, "[I]n appropriate circumstances admissions may nevertheless be excludable on nonconstitutional grounds, i.e., if the admissions were given under circumstances suggesting unreliability or untrustworthiness." Davis relies on *People v. Cox* (1990) 221 Cal.App.3d 980 (*Cox*) to support her claim that the trial court should have excluded her statements on these nonconstitutional grounds.

Like the argument Davis presents here, "[t]he thrust of Cox's argument . . . [was] not that the police were coercive, but that his mental condition was such as to preclude a knowledgeable and voluntary decision to make incriminating statements." (*Cox, supra*, 221 Cal.App.3d at p. 986.) The *Cox* court rejected this argument, stating, "Exclusion of evidence on this ground was conclusively rejected by the United States Supreme Court in *Colorado v. Connelly* (1986) 479 U.S. 157, 164-167." (*Cox, supra*, 221 Cal.App.3d. at p. 986.) The *Cox* court explained:

> "The defendant in [*Colorado v. Connelly*] claimed his incriminating statements were not voluntary because of his psychotic state. The court emphasized the element of police coercion as the transgression on constitutional rights. The purpose of the exclusionary rule is to deter violations of the Constitution. Where no constitutional violation has occurred, state rules of evidence are appropriate to govern the admissibility of evidence and to guard against false or unreliable evidence." (*Cox, supra*, 221 Cal.App.3d at p. 986.)

In a footnote, the *Cox* court noted that it could "conceive cases in which an admission, although not coerced or otherwise obtained in violation of other constitutional protections, might well be excludable under substantive state law evidentiary provisions."

(*Cox, supra*, 221 Cal.App.3d at p. 986, fn.3.) "Thus, evidence of Cox's admission might have been excludable (without reference to federal constitutional protections) under Evidence Code section 352 if it were found to be so unreliable or untrustworthy (i.e., because he was allegedly psychotic when he spoke) that its probative value was outweighed by its prejudicial impact; and *Connelly* would sanction exclusion of the evidence on state law evidentiary grounds even though it was not obtained by coercion in violation of the federal Constitution. [Citation.]" (*Cox, supra*, 221 Cal.App.3d at p. 986, fn. 3.)

Davis relies on this portion of *Cox* to suggest that the trial court should have excluded her statements on state evidentiary grounds.[12] However, like the defendant in *Cox*, Davis failed to object to the admission of her statements on any nonconstitutional ground. (See *Cox, supra*, 221 Cal.App. 3d at p. 986, fn. 3.) This failure constitutes a forfeiture of the right to claim error from the admission of the statements on these grounds. (*Ibid*.)

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12 Davis seems to mix constitutional and state law concepts throughout this section of her brief, creating a somewhat confusing argument. However, the central theme of Davis's argument is the question of the "voluntariness" of her statements under state law, not under the federal Constitution. Davis focuses on the concept identified in footnote 3 of *Cox, supra*, 221 Cal.App.3d at page 986—i.e., the idea that a confession might be excludable under Evidence Code section 352 even if it is not subject to exclusion on federal constitutional grounds, as a result of being unreliable or untrustworthy (due to the defendant's mental state at the time). Although Davis repeatedly uses terms that relate to the constitutional analysis of the voluntariness of statements and/or *Miranda* waivers, Davis does not actually set out an independent constitutional claim that the trial court should have excluded her statements because her *Miranda* rights were violated or because her statements and/or *Miranda* waiver were involuntary (i.e., the result of police coercion).

Davis contends, however, that her case is distinguishable from *Cox* because in this case, neither the court nor defense counsel "ha[d] the results of the expert's findings pertaining to appellant's mental condition until after the suppression hearing." Davis argues that Dr. Stalcup's testimony at trial as to Davis's intoxication and her mental state provide the basis for a different result here. However, Dr. Stalcup's testimony at trial does not change the fact that Davis did not object to the admission of her statements on grounds that she was under the influence of methamphetamine at the time she made the statements.

Davis suggests that because Dr. Stalcup's testimony was not available to the court before the suppression hearing, she should therefore be permitted to raise this issue on appeal. However, the fact that Davis was a methamphetamine addict was not new information that came to light only after Dr. Stalcup provided his expert report. The defense could have obtained an expert opinion regarding the effect of Davis's methamphetamine use on her police interviews before the suppression hearing, and could have made the argument that Davis presents for the first time on appeal. Davis failed to raise this issue in the trial court, and is barred from asserting it on appeal. (See *People v. Michaels, supra,* 28 Cal.4th at p. 511 [defendant's failure to raise issue of his capacity to waive Miranda rights at time of interrogation due to his being under the influence of methamphetamine barred him from asserting claim on appeal].)

Further, even if we were to agree with Davis that Dr. Stalcup's trial testimony somehow differentiates this case from *Cox*, Davis never raised the issue of the admissibility of her statements on this "new" ground—i.e., on the ground that Dr.

Stalcup's testimony provided new evidence that she did not knowingly and voluntarily make the statements and/or that the statements were so unreliable as to be more prejudicial than probative—even after she became aware of Dr. Stalcup's opinions. Davis suggests that trial counsel "was not aware of the extreme extent to which [she] was impaired," and therefore "was not in a position to effectively argue inadmissibility on the basis of the unreliability of [Davis's] statements" at the pretrial hearing. However, even after counsel learned of Dr. Stalcup's opinions, which was sometime before February 26,[13] counsel never moved to exclude Davis's statements on the grounds she raises on appeal. Certainly by the time defense counsel received Dr. Stalcup's report, counsel was "in a position to effectively argue inadmissibility" on the ground that Davis raises on appeal.

Perhaps in an effort to avoid the consequences of counsel's failure to raise this issue either at the original suppression motion or after having learned of Dr. Stalcup's expert opinions, Davis contends that it was the trial court's duty to "reinitiate[] the suppression hearing so as to ensure that its initial ruling was appropriate and still warranted," after the court heard Dr. Stalcup testify at trial. Davis provides no authority to support this assertion, and we know of no authority that suggests that the trial court had any independent duty to "reinitiate" a suppression hearing in the absence of a defense request or a renewed objection. Davis did not make any such request and did not seek to exclude the statements on the ground that Dr. Stalcup's testimony raised the issue of

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13 At a hearing on that date, the prosecutor acknowledged having received a report from Dr. Stalcup.

whether Davis's statements to police were made knowingly and voluntarily. Davis has therefore forfeited this issue on appeal.

Further, in making this argument, Davis overestimates the potential effect that Dr. Stalcup's testimony might have had on the trial court's decision whether to admit the statements she made to police. The trial court viewed the video recordings of Davis's interviews, and was able to observe Davis's demeanor and her responsiveness to the detectives' questions. In addition, Dr. Stalcup did not testify that Davis was unable to understand the questions asked, or that she was incapable of making the choice to talk with detectives. He was not asked if he had an opinion as to whether Davis was able to make the statements voluntarily. In fact, at least with regard to one of the interviews, Dr. Stalcup's testimony was that Davis was *not* under the influence of methamphetamine: "During that first interrogation, her appearance was that of someone entering or in the midst of the crash phase. So she was not, what you would say, formally under the influence. She wasn't intoxicated, per se."

There is nothing in the record that suggests that Davis was unable to understand what the detectives were asking her. Davis responded appropriately to the detective's questions and had no trouble indicating to detectives when she did not understand a question or was experiencing a memory lapse. The record does not support Davis's contention that Dr. Stalcup's testimony would have influenced the court to exclude her statements on the ground that they were more prejudicial than probative because they were too unreliable and untrustworthy, as a result of Davis being under the influence of methamphetamine at the time she made them.

D. *There is substantial evidence to support the jury's special circumstance findings*

Davis challenges the sufficiency of the evidence to support the jury's true findings on the special circumstance allegations that Salanti was murdered during the commission of a burglary and during the commission of a robbery. Specifically, Davis contends that there is "no evidence suggesting that she was a 'major' participant [in the crimes], and, in fact, the evidence suggests the very opposite." She further contends that "there is no evidence [she] acted with the reckless disregard of life that is required for the special circumstance finding."

In order to find the special circumstances true, the jury had to find either that Davis (1) was the actual killer and acted with or without an intent to kill (Pen. Code, § 190.2, subd. (b)); (2) was not the actual killer, but aided and abetted the robbery and burglary with an intent to kill (Pen. Code, § 190.2, subd. (c)); or (3) was not the actual killer, but was a major participant in the robbery and burglary and acted with reckless indifference to human life (Pen. Code, § 190.2, subd. (d)).[14]

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14 Penal Code section 190.2 provides in relevant part:

> "(b) Unless an intent to kill is specifically required under subdivision (a) for a special circumstance enumerated therein, an actual killer, as to whom the special circumstance has been found to be true under Section 190.4, need not have had any intent to kill at the time of the commission of the offense which is the basis of the special circumstance in order to suffer death or confinement in the state prison for life without the possibility of parole.
>
> "(c) Every person, not the actual killer, who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or

Davis presumes that the jury's findings were based on its conclusion that she was not the actual killer, and/or that she did not intend to kill Salanti, and that her only role was as an accomplice to the robbery and the burglary. However, in its verdict, the jury found Davis guilty of first degree murder. The jury made no findings with regard to whether she acted alone or whether she intended to kill Salanti. Even if we were to presume, as Davis does, that the jury determined that Davis was not the actual killer, and that the jury found the special circumstances to be true on the basis of a finding that

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> assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for life without the possibility of parole if one or more of the special circumstances enumerated in subdivision (a) [including murder during the commission of robbery] has been found to be true under Section 190.4.
>
> "(d) Notwithstanding subdivision (c), every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony [including robbery] which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under Section 190.4."

"Subdivision (d) of section 190.2, . . . 'was added by Proposition 115 in order to bring the death penalty into conformity with *Tison v. Arizona* (1987) 481 U.S. 137, 158 [*Tison*] . . . . [Citation.] *Tison* held that the death penalty may be imposed in a case of "major participation in the felony committed, combined with reckless indifference to human life." Put another way, *Tison* held "that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result." [Citation.]' [Citation.]" (*People v. Proby* (1998) 60 Cal.App.4th 922, 927-928 (*Proby*).)

Davis was a major participant in the crimes and acted with reckless disregard for human life, we would conclude that there is substantial evidence to support these findings.

"We review a challenge to the sufficiency of the evidence to support a special circumstance finding as we review the sufficiency of the evidence to support a conviction. [Citation.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1229.) "In reviewing a criminal conviction challenged as lacking evidentiary support, 'the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496.) In addition to "view[ing] the evidence in the light most favorable to the judgment," we also "presume in favor of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence." (*People v. Johnson* (1993) 6 Cal.4th 1, 38, disapproved on another point in *People v. Rogers* (2006) 39 Cal.4th 826, 879.)

There is substantial evidence that Davis was a major participant—if not the only participant—in the robbery and burglary. "[A] 'major participant' in the underlying crime includes persons ' "notable or conspicuous in effect or scope" and "one of the larger or more important members or units of a kind or group." ' " (*People v. Hodgson* (2003) 111 Cal.App.4th 566, 578, fn. omitted (*Hodgson*), citing *Proby, supra*, 60 Cal.App.4th at pp. 933-934.) In *Proby, supra*, 60 Cal.App.4th at page 929, the court upheld a jury's finding that the defendant was a major participant and acted with reckless indifference to human life where the defendant—one of two armed robbers in a McDonald's robbery—provided

the actual killer with the gun used in the killing; was himself armed with a semiautomatic handgun; did not witness the shooting but saw "pus" ooze out of the victim's head and did nothing to assist him; and thereafter helped his accomplice take money out of the restaurant safe.

In *People v. Mora* (1995) 39 Cal.App.4th 607 (*Mora*), the court held that the evidence was sufficient to meet the "'major participant' element" of the special circumstance finding where the defendant helped plan the robbery of a drug dealer, was instrumental in arranging for his accomplice to enter the victim's home with a rifle, and carried through with a plan to steal the drugs, leaving the victim to die. (*Id*. at p. 617.) The defendant in *Hodgson, supra,* 111 Cal.App.4th 566, was determined to be a sufficiently "major participant" where the robbery involved only two perpetrators, and the defendant held open an electric garage gate so that the actual killer could escape. (*Id*. at pp. 579-580.) More recently, in *People v. Smith* (2005) 135 Cal.App.4th 914 (*Smith*), questioned on other grounds in *People v. Garcia* (2008) 168 Cal.App.4th 261, 291-292, the court determined that the defendant's "contributions [to an attempted robbery] were 'notable and conspicuous' because he was one of only three perpetrators, and served as the only lookout to an attempted robbery occurring in an occupied motel complex. [Citation.]" (*Id*. at p. 928.) The *Smith* court noted that, "[u]nlike the hypothetical 'non-major participant' in *Tison*[, *supra,* 481 U.S. at p. 158]—who 'merely [sat] in a car away from the actual scene of the murders acting as the getaway driver to a robbery'—[the defendant] stood sentry just outside [the victim's] room, where the jury could infer he

monitored and guarded the increasingly lengthy, loud, and violent attempted robbery-turned-murder. [Citation.]" (*Ibid*.)

Here, the jury clearly rejected Davis's defense that she let two men into Salanti's home under duress, and concluded instead that Davis intended, at a minimum, to rob Salanti and to burglarize his home, either with others or by herself. Even assuming that two unidentified men joined Davis in perpetrating the robbery and burglary, and that one or both of these men were the actual killers, the jury could have reasonably concluded that Davis's participation in the robbery and burglary was notable or conspicuous. Davis was the person who had access to Salanti's condominium, and she provided access to Salanti's home to her claimed accomplices. Davis knew about the drugs and large sums of money that Salanti kept hidden around his condominium and in his safe. In fact, the evidence suggests that Davis initiated the criminal scheme on her own. At trial, Davis testified that her two alleged accomplices had not arrived at Salanti's home before she had gone to get drinks from the nearby 7-Eleven, which was at 3:12 p.m. on the afternoon of September 24, according to surveillance video. However, at approximately 1:30 p.m. that afternoon, someone performed a search on Salanti's computer regarding Liberty safes—hours before Davis claims her alleged accomplices arrived.

Further, Davis admitted that she was present in the condominium when Salanti was being beaten, and admitted that she did not render any aid or seek assistance. Instead, by her own admission, Davis drove her alleged accomplices away from the scene, thereby helping to ensure their escape. She also continued to search for hidden drugs and money while living in Salanti's home for a number of days after he was killed,

attempted to clean up the crime scene, and conducted internet searches concerning how to get rid of the odor of a dead body. Davis even told a stranger on the trolley that she needed help getting rid of a body. Davis drove Salanti's car, and lied to the locksmith about Salanti's whereabouts days after he was killed. All of this evidence supports a finding that Davis was a "major participant" in the robbery and burglary.

Similarly, there is substantial evidence demonstrating that Davis acted with reckless indifference to human life. "The term 'reckless indifference to human life' means 'subjective awareness of the grave risk [to] human life created by his or her participation in the underlying felony.' [Citation.]" (*Proby, supra,* 60 Cal.App.4th at p. 928.)[15] Even if Davis did stay in another room while Salanti was beaten and wrapped in duct tape, as she maintains, the jury could have reasonably found that she became aware of a grave risk to human life once she heard her accomplices beating Salanti.[16] (See *Smith, supra,* 135 Cal.App.4th at p. 927 ["Even if Taffolla remained outside [the victim's] room as a lookout, the jury could have found Taffolla gained a 'subjective awareness of a grave risk to human life' during the many tumultuous minutes it would have taken for Star to be stabbed and slashed 27 times, beaten repeatedly in the face with a steam iron, and had her head slammed *through* the wall."].) Davis acknowledged multiple times that she could hear Salanti being beaten, yet she admittedly did not attempt to aid Salanti or summon

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15 The trial court instructed the jury "A person acts with reckless indifference to human life when he or she knowingly engages in criminal activity that he or she knows involves a grave risk of death." (Italics omitted.)

16 This presumes that the jury believed Davis's claim that she was in another room while one or both of her alleged accomplices beat Salanti.

assistance. (See *ibid*; see also *Tison, supra,* 481 U.S. at p. 158 [noting that the major participant and reckless indifference requirements "often overlap"] .) Instead, according to Davis, she drove her alleged accomplices away from the scene, effectively ensuring their escape, thereby demonstrating a reckless indifference to human life. (See *Tison, supra,* at pp. 151-152 [fact that defendant "stood by and watched the killing, making no effort to assist the victims before, during, or after the shooting" and "[i]nstead . . . chose to assist the killers in their continuing criminal endeavors, ending in a gun battle with the police in the final showdown" would support a finding that he "subjectively appreciated that [his] acts were likely to result in the taking of innocent life"].)

E. *Davis's sentence does not constitute cruel or unusual punishment*

Davis contends that under the particular circumstances of her case, the sentence of life imprisonment without the possibility of parole violates the federal and state Constitutions' prohibitions against cruel or unusual punishment. We find this argument to be without merit.

1. *Davis's sentence does not violate the California Constitution*

A sentence may violate the state constitutional ban on cruel or unusual punishment "'if . . . it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' " (*People v. Dillon* (1983) 34 Cal.3d 441, 478 (*Dillon*).) In *People v. Romero* (2002) 99 Cal.App.4th 1418 at pages 1431-1432, the court outlined the well established framework for considering claims of cruel or unusual punishment under the state Constitution:

> "'In order to determine whether a particular punishment is disproportionate to the offense for which it is imposed, we conduct a three-pronged analysis. [Citations.] First, we examine the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society. A look at the nature of the offense includes a look at the totality of the circumstances, including motive, the way the crime was committed, the extent of the defendant's involvement, and the consequences of defendant's acts. A look at the nature of the offender includes an inquiry into whether "the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." [Citation.] Next, we compare the challenged punishment with the punishment prescribed for more serious crimes in the same jurisdiction. And finally, the challenged punishment is compared with punishment for the same offense in other jurisdictions.' [Citation.]" (*Romero, supra*, 99 Cal.App.4th at pp.1431-1432.)

A defendant must overcome a considerable burden in order to establish that the sentence is disproportionate to his level of culpability. Successful challenges to proportionality are an "exquisite rarity." (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196-1197.)

Davis points out that she was 25 years old at the time she committed the crime, and that her only criminal history consists of a misdemeanor conviction for solicitation, for which she served no jail time. She also highlights that she has suffered from depression, was diagnosed with attention deficit hyperactivity disorder, and "was under significant emotional distress having had an abortion just weeks before this incident and having been turned away from her mother's home as well as from her boyfriend's [home]."

Davis further contends that "while it is unknowable just how Salanti came to be killed, the evidence strongly suggests appellant did not participate in the killing and

certainly did not intend that he be killed." She intimates that her intent was only to commit a theft while Salanti was away, and that things unexpectedly escalated when Salanti returned home. According to Davis, the evidence "appears to bear out her testimony that she was not involved in [Salanti's death], or that if she was, his death was accidental."

We disagree. Other than Davis's testimony, there is no evidence that anyone else participated in this crime. Specifically, police found no forensic evidence that would support Davis's claim that two African-American men had been inside the condominium and that they killed Salanti. Further, even if Salanti's death was accidental as Davis claims, the evidence shows that it nevertheless involved violence. Salanti's ribs were fractured and his body and face were bruised. Salanti's head was covered in duct tape, which, according to the medical examiner, likely caused him to suffocate. Covering a person's nose and mouth with duct tape would create a high risk that the person will die. Thus, even if the perpetrator or perpetrators did not intend to kill Salanti, he, she or they acted with reckless disregard for his life.

Even when viewed in the most positive light for Davis, the evidence demonstrates that Davis was the key to the entire crime, since according to her own version of events, she was the only person who had access to Salanti's home and particular knowledge of the money and drugs that he kept there. The jury clearly rejected Davis's defense that she let two men into Salanti's home under duress, concluding instead that Davis intended, at a minimum, to rob Salanti and burglarize his home, either with others or by herself. Thus,

regardless of who committed the act(s) that caused Salanti's death, Davis's individual culpability was significant.

Davis compares her sentence to the sentence imposed on the defendant in *Dillon, supra,* 34 Cal.3d at page 477, arguing that the facts of this case weigh more heavily in favor of a reduced sentence than did the facts in *Dillon*, in which the Supreme Court found the punishment to be unconstitutionally excessive. The defendant in *Dillon* was a 17-year-old high school student who, according to an expert, was immature, and functioned and acted "like a much younger child." (*Dillon, supra*, at p. 483.) The Supreme Court noted that in the unusual circumstances of that case, unlike in this one, "the record repeatedly demonstrate[d] that the judge and jury in fact gave defendant's testimony large credence and substantial weight." (*Dillon, supra,* at p. 482.) The testimony in *Dillon* was that the defendant's state of mind on the night of the killing went "from youthful bravado, to uneasiness, to fear for his life, to panic." (*Ibid*.) The defendant heard at least two shotgun blasts and believed his friends were being shot by marijuana plantation guards, whom he had seen carrying shotguns. (*Ibid*.) He heard a man coming up behind him, and saw that it was the victim carrying a shotgun that appeared to the defendant to be pointing at him. (*Ibid.*) The defendant shot in the direction of the victim. (*Ibid*.)

The defendant in *Dillon* had no criminal record, and the punishment "turned out to be far more severe than all parties expected" because although the trial court attempted to commit Dillon to the Youth Authority, at the time of his conviction, a minor convicted of

first degree murder was ineligible for commitment to the Youth Authority. (*Dillon*, 34 Cal.3d at p. 486.)

The facts of this case are easily distinguishable from those in *Dillon*. Davis was an adult at the time of the crime, and was addicted to methamphetamine. She had been arrested for solicitation, and admitted to having previously stolen a significant amount of money from the victim. Further, the jury clearly rejected Davis's testimony that she acted while in fear for her life, determining instead that Davis freely participated in the crimes. The facts of this case simply do not compare with the unusual facts presented in *Dillon*.

Davis also contends that her sentence is cruel or unusual because "the jury itself did not believe Salanti's death was intended." Davis points to letters that two jurors submitted to the court in which the jurors indicated a desire that the court not sentence Davis to life without the possibility of parole. However, assuming that this court may consider these letters, the letters do not establish that the jury rejected the prosecution's theory that Davis acted alone in committing the crimes. Nor do they establish that the jury believed that Davis played only a minor role in Salanti's death. The letters do not provide a sufficient basis for holding that a sentence of life without the possibility of parole is unconstitutionally cruel or unusual. The fact that an individual—even a juror—may disagree with a particular punishment does not establish that the punishment is so disproportionate to the crime that it shocks the conscience or offends notions of human dignity.

Davis also suggests that a reduction in her sentence is appropriate because the prosecutor added the special circumstance allegations only after Davis "chose to exercise

her constitutional right to a trial." As we have already discussed, there was nothing inappropriate about the prosecutor's decision to allege the existence of the special circumstances after plea negotiations failed to produce a result satisfactory to both parties.

Finally, Davis contends that even the trial judge "did not feel comfortable imposing a sentence of life without parole on appellant under the circumstance of this case and, in fact, did everything [the court] could do to encourage the District Attorney not to insist on the special circumstance allegation." In support of this contention, Davis cites the fact that the judge "made arrangements" for the prosecutor and defense counsel to talk with another judge to attempt to negotiate a deal before final sentencing. However, in imposing sentence, the trial court stated, "At this point I believe that the way the law is set up that this is not cruel and unusual punishment for the particular offense legally. Now, I'm saying that upfront because I think it's only fair at this stage." The court also said, "I think she was more involved than what she was saying, and I think she's definitely felony murder . . . eligible. I believe based upon what – in reading in between the lines if you're asking me to act as the 13th juror [–] that the special circumstance was pled and proven." Further, although the judge stated that she thought that a plea deal in which Davis pled guilty on a charge of first degree murder would have been a good solution, this does not mean that that the trial court did not feel "comfortable" imposing a sentence of life imprisonment without the possibility of parole, as Davis claims. Regardless, the fact that a judge might believe a punishment is too severe is not itself a reason to reduce the punishment: "If the punishment mandated by

law for a special circumstances murder is so grossly disproportionate to a particular defendant's individual culpability as to constitute cruel or unusual punishment under *Dillon*, a court has authority to prevent the imposition of unconstitutional punishment. [Citations.] In such cases the punishment is reduced because the Constitution compels reduction, not because a trial court in its discretion believes the punishment too severe. Reduction of sentence under *Dillon* ' "must be viewed as representing an exception rather than a general rule." ' [Citation.]" (*Mora, supra*, 39 Cal.App.4th at p. 615.)

Davis compares her punishment with the punishments prescribed for others who commit serious crimes in California. For example, she complains that an individual who commits "an intentional, premeditated and cold-blooded murder" will receive a sentence of 25 years to life and will be eligible for parole after 25 years. She also points out that someone who commits a "malicious murder, with conscious and wanton disregard for human life" will receive a sentence of 15 years to life and will be eligible for parole after 15 years, and compares her sentence with the sentences that are imposed for rape and voluntary manslaughter. According to Davis, her "culpability arguably pales in contrast to the intent of the perpetrators in these foregoing offenses, especially if it is true, as the court itself surmised, that appellant enabled the two co-conspirators to enter Salanti's house at the urging (or compulsion) of her physically abusive boyfriend/pimp."

These comparisons do not help Davis, since there are crimes other than murder that also carry indeterminate sentences. For example, kidnapping for ransom or extortion where the victim suffers death or bodily harm is punished by life imprisonment without the possibility of parole. In situations in which the victim does not suffer death or bodily

harm, the punishment is life imprisonment with the possibility of parole. (Pen. Code, § 209, subd. (a).) A sentence of life without possibility of parole for aggravated kidnapping has been held not to be cruel or unusual. (*People v. Chacon* (1995) 37 Cal.App.4th 52, 64.)

In this case, the jury found true both special circumstance allegations, meaning that the jury concluded that Davis was a major participant in two felonies—a robbery and a burglary. We see nothing unconstitutionally disproportionate about the legislative decision to impose a harsh indeterminate sentence as the consequence for a death that resulted during the defendant's voluntary participation in these serious felonies. Further, Davis's argument presumes that the jury believed that Davis was not the person who committed the fatal act; but there is sufficient evidence in the record to support a finding that Davis—and not an unidentified perpetrator—caused Salanti's death, and there is nothing in the record that indicates that the jury did not so find. A sentence of life imprisonment without the possibility of parole is clearly proportionate to Davis's culpability under this scenario.

As for comparing Davis's sentence with sentences for similar crimes in other jurisdictions, Davis contends that "a comparison of the felony murder statutes of our sister states is not as relevant to the question at hand as is the first . . . prong [i.e., the nature of the offender and the offense]." Rather than provide a comparison of the punishment for similar crimes in other states, Davis instead notes that the felony murder rule is unknown, or has been abolished, in other countries. This contention is not relevant to our three-pronged analysis under California law.

In sum, we disagree with Davis's claim that the nature of her offense and the totality of the circumstances render her sentence so grossly disproportionate to her crime that it "shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424.)

2. *Davis's sentence does not violate the federal Constitution*

We reject Davis's cursory argument that her sentence violates the Eighth Amendment's prohibition against cruel and unusual punishment.[17] In *Harmelin v. Michigan* (1991) 501 U.S. 957, the United States Supreme Court upheld a sentence of life without the possibility of parole for a defendant who was convicted of possessing 672 grams of cocaine (*Id*. at pp. 961, 996.) In view of that holding, we cannot say that Davis's comparable sentence for her participation in (if not sole responsibility for) crimes that resulted in a man's violent death, violates the Eighth Amendment.

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17 Davis's legal analysis with regard to her claim of cruel or unusual punishment is focused exclusively on California law related to the California Constitution. However, Davis does make reference to the Eighth Amendment to the federal Constitution in her introduction to this section, and asserts, at the end of this section, that "the sentence imposed upon appellant violates both the state and federal Constitutions (i.e., the Eight[h] Amendment['s] prohibition against cruel and unusual punishment)" such that "her sentence should, at a minimum, be reduced to 25 years to life, the normal sentence for a first degree robbery-felony murder . . . ." We address this generic contention, despite the fact that we could treat the issue as forfeited on appeal for lack of specific argument and/or citation to authorities. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793 [court may treat as waived points for which no legal argument and citation to authorities has been provided].)

IV.

DISPOSITION

The judgment and sentence of the trial court are affirmed.

AARON, J.

WE CONCUR:

HUFFMAN, Acting P. J.

IRION, J.